

## COMPARATIVE LAW APPROACHES TO MEDIA ACCESS TO COURT PROCEEDINGS

SPEAKER 1: Conference The Court of Public Opinion, The Practice and Ethics of Trying Cases in the Media. This is day two of our conference, and we have a very full day. The first panel we're going to hear from this morning will be on comparative law. We'll then have a panel on Institutional Response to Crisis. We have a lunch panel on Living Through Lacrosse which will be followed by remarks from President Brodhead who will be joining us for part of that panel and then for his comments. Then we have a panel on the Role and Responsibility of the Public, and our last panel will be the Role and Responsibility of the Court.

We are delighted that C-SPAN is here today and they will be filming this panel, The Comparative Law panel and they will be filming the judges' panel as well. They're going to have their stuff setup throughout the day, but they will be filming those panels and we expect we may also have media coverage of the lunch time panel and of the President's speech. So we ask your indulgence for the lights and we hope that you'll be here for the whole day with us. And I'm going turn it over now to our first panel.

BIGNAMI: Welcome to this morning's panel on Comparative Media law.

Yesterday evening Howard Schneider argued that the remedy for episodes like the Duke Lacrosse case is the public; educating the public to be critical consumers of the news. And I hope I'm not putting words in the mouths of today's panelists, but at least some of them, I think, will tell us that the solution is instead comparative law.

Looking to how the law in other countries resolves the conflict between speech and fair, unbiased court proceedings, what types of restrictions on the press do other countries employ to ensure that defendants get a fair trial? And what types of restrictions do other countries employ to ensure that the reputation of innocent defendants is not irreparably damaged in the course of legal proceedings?

To bring this forum perspective, we have experts on European and Canadian law on today's panel, and we also have Lucy Daghish to reflect on all of this from an American perspective.

Giorgio Resta sitting on my left is Associate Professor of Comparative Law at the University of Bari in Italy. He has written numerous books on comparative privacy law. He has

taught at universities throughout Europe and Latin America. Professor Resta will focus on the national laws of continental Europe. He will also discuss some of the case law of the European Court of Human Rights. And for those of you who are not international lawyers, the European Court of Human Rights is an international tribunal located in Strasbourg with jurisdiction over 47 countries including Italy, United Kingdom, Germany, Russia, Turkey, and other places.

Sitting to his left is Gavin Phillipson. He comes from the other Durham. The one that's a little bit older than this one. He's Professor of Law at the University of Durham. He has written numerous books and articles on civil liberties under UK law and the European Convention on Human Rights. And his work was cited in a 2004 opinion by the House of Lords in the absolutely groundbreaking case of Naomi Campbell. That case established for the first time a right to privacy under UK law. Professor Phillipson will be focusing in UK law and the European Convention of Human Rights.

To his left is Peter Jacobsen who will fill us in on Canadian law; coming closer to home here. He is partner

with a Toronto firm of Bersenas, Jacobsen, Chouest, Thomson, Blackburn. His experience on these legal issues is vast. He represents a variety of print and electronic media clients.

And then we return metaphorically speaking to the United States with Lucy Dalglish. And she is the Executive Director of the Reporters Committee for Freedom of the Press. As such, she is one of the country's leading advocates of freedom of the press.

Each of the speakers will have 15 minutes for their presentations. They will speak in the order in which I just presented them. This is designed to start with the most foreign system, the civil law in continental Europe, and gradually work our way back to the United States. And the time that remains, which will be about 15 minutes, will for questions and open debate. And I hope debate on how appropriate European law is for the United States as a way of handling future episodes like the Duke Lacrosse case. So I turn it over to Professor Resta.

RESTA:

Thank you very much Professor Bignami. I'm really grateful for the invitation to the entire Conference Committee and to Kathryn Bradley particular. And I'm really it's an honor

and a pleasure for me to be here. The discussion from yesterday was extremely interesting from my point of view. And I prepared a paper for that would be later given to the conference materials, but I will not read it, because otherwise it's going to take too long, so I hope you will forgive my many possible English mistakes. I will try to make my best.

I would like to raise a question and make basically three points starting from an issue that was discussed yesterday evening in the panel about the role of the prosecutor. Professor Metzloff was asking yesterday evening whether it would not be desirable to change the ABA Rules by stating openly and expressly that prosecutors have to respect the presumption of innocence of the defendant in a criminal case. It was like a provocative question, but I think it has some general meaning that we should really take seriously in a comparative perspective.

The point I'd like to make is the question I'd like to raise is exactly this one. In a context in which there is a strong competition on the part of the newspaper, on the part of the press, on the part of the broadcasts, in a context in which the communication of information is

growing, in which the freedom of speech is often exercised more on commercial concerns than on public interest concerns, and in a context in which the power of the media in framing your opinion is undisputable, does it make really sense -- is it socially desirable -- that we think of the constitutional guarantees of a fair trial only as limited to the radical relationship between the citizen and the state? And in particular what is the meaning in this social context of the presumption of innocence?

Presumption of innocence is so defined by the European Convention of Human Rights in Article 6 related to the fair trial, it's stated that everyone charged with a criminal offense should be presumed innocent until proved guilty according to law. So what is this? Is this just a procedural guarantee limited to the relationship between the defendant in a criminal trial and the judicial authorities? Are other public authorities bound by the presumption of innocence? And then should it just be only a principle limited to the vertical relationship or should we think of the presumption of innocence in terms of a right to respect of the presumption of innocence that should be opposable to third parties and then lead to private parties and the media?

This may sound as a provocative question, because we know from the constitutional theory that all these rights should basically be limited to relationship between the citizens and the state, but the comparative constitutional law can teach us that this is not the only way of looking at the constitutional protections. And in particular if we look at the evolution of European law in the last years, in the last ten years at least, my impression is that we can observe a progressive move, a progressive shift from the presumption of innocence conceived only as a principle, as a procedural safeguard to a right, a right that has to be respected also by the private parties.

Let me just give a couple of examples taken from the case law of the European Court of Human Rights. I hope I will have time to come back, but just to give you some concrete sense of what I mean. These two cases are attached in the conference materials.

The first one is the decision (Inaudible) v. France. It's a decision of 1995 of the European Court of Human Rights. In this decision France was condemned to pay damages to a businessman for a violation of his rights to respect of

presumption of innocence. The fact of the case he was arrested in 1979 for the murder of a member of Parliament and former Minister, (Inaudible). Two days later during a press conference the Minister of the Interior and Senior Police Officer stated in absolute terms that the case was solved and that the authors of the crime were arrested just a couple of days after the arrest.

(Inaudible) was described as one of the instigators of the murder. At trial he was eventually acquitted and sued the state for pecuniary and nonpecuniary damages. His claim was dismissed in France, but accepted by the European Court of Human Rights on the ground that presumption of innocence. One of the elements of a fair criminal trial in Article 6 of the European Convention is not only a procedural guarantee, but also a right that has to be respected by all public authorities. Not only the judicial authorities, because here it was an act made by the police and the Minister of Interior and it was outside the criminal trial. And this is a first important move. We see the presumption of innocence that goes outside from the original criminal rules.

And the second decision was another important decision



(Inaudible) v. (Inaudible) I'll come back later on, but (inaudible) another decision that can give a sense of this transforming idea of presumption of innocence. And it's (Inaudible) v. Austria. A decision of 2000 also attached to conference materials.

Here the Austrian courts had issued injunctions prohibiting the reproduction of the likeness of a right-wing extremist arrested on the suspicion of having sent several letter bombs in connection with an article reporting on his terrorist campaign. These injunctions were granted on the basis of the Copyright Act and the Media Act, which grants every citizen the right to respect of presumption of innocence as regards also private parties.

It is stated in this Article 7 that if in any media a person suspected of having committed an offense punishable by the courts but not yet finally convicted is presented as having already been found guilty or as author of such punishable offense and not only as a suspect, the person affected is entitled to claim indemnity from the media owner for the injury suffered. And there are similar provisions also in France that give injunctions in these situations.

Well, in this decision of the European Court of Human Rights recognized that injunctions were intended to protect the defendant against insulting defamation and against violations of the presumption of innocence, and therefore, they pursued legitimate aims according to Article 10 that guarantees the freedom of the press of the Convention. However, in a proportionality test they were considered over-broad and not proportionate to the aims pursued.

This case we have a protection of the freedom of the press made by the European Court of Human Rights, but it wasn't made just on the proportionality test. In other decisions these injunctions and these compensatory damages were upheld by The Court, reasoning that presumption of innocence is a right that has to be protected by the State. So we see in this perspective a changing idea of changing meaning of presumption of innocence.

But in order to understand the implications and the premises of this move in the European law, we should probably put into context all of this discussion about the relationship between the media and the law in a comparative perspective.

I would like to distinguish three theoretical models of coping with the problem of court related speech. Usually in the comparative literature, only two models are distinguished. A pick-up distinction made by (Inaudible) in his book on Courts, Speech, and the Constitutions, which reflects a view widely shared in the literature.

Under the first model called The Scrutiny of Government Model, any limitation of media freedom to access and comment upon judicial proceeding is seen as prima facie suspect or unlawful. If an exceptional situation in the exercise of the freedom of the press results in an obstacle to the fairness of the proceedings, the legal system seeks not to punish the party causing prejudice, but rather resource to remedial devices such as voir dire, judicial sequestration, change of venue, as you know, retrials, aimed at mutualizing or diminishing the impact of adverse publicity. And this is clearly the American model after the decisions of the Supreme Court in Nebraska v. Price and Shepherd v. Max.

The second model, the Administration of Justice Model, takes media threats to referrings of the proceedings more

seriously. As a consequence it's subject to the exercise of the freedom of the press to stricter constraints. The individual and societal interest in an unimpeded administration of justice are given much more weight than the values served by an unlimited freedom of speech. Accordingly, instead of resulting only to expose remedial devices, this model makes extensive use of criminal sanctions in order to deter disclosure of facts or statements of opinions which would pose serious risks to the fairness of the proceedings or would diminish public confidence in the administration of justice. And this is typically the common law approach under the law of content that we can see in all the common law countries outside of the United States, as probably also Professor Phillipson could clarify about England.

But this distinction from my perspective is widely shared in the literature is lacking to some points. First because it's a statical distinction and we see a legal system are always evolving and the evolution that is interest, for example, the English, United Kingdom, and Canada legal system to some sort, to some extent, has reduced the divide with the American approach, even though the American solution is quite isolated in a common law perspective.

The second point is that this distinction reflects just a common law jurisdiction approach. But we have to consider that in civil law jurisdictions we don't have many institutional factors that make the problem of the relationship fair trial/free press so difficult, because in our civil law jurisdictions there is no political role of the prosecutor. The prosecutor is usually a civil servant, but does not run for reelection. Second, we don't have all lady juries. We have a mix of courts, a mix of juries. We have professional judges that decide together with lay assessors. And third, we have different rules on evidence that make the publication of some information less important to the proceedings.

So to some point our concern is not so much with the fairness of the proceeding that could be put in danger by adverse media publicity, but on other points. And particularly on the dignitary interest of the person who are involved in the trial. And this is another perspective, another way of looking at the same problem dependant on the particular institutional factors that are in play in the civil law jurisdiction.

I don't have time to come too much into details, but I would like just to state that in our perspective, we have basically three way of approaching to the problems of media adverse publicity. The first one is the criminal sanctions directed at preserving the pretrial secrets. Of course, you have to consider that we have inquisitorial models of the criminal proceedings so the secrecy of the investigation is an important point of the entire procedure.

And the secrecy of the investigation is protected basically for under two rationales. The first is the efficiency of the investigation, and the second is the protection of presumption of innocence, because if some notices are put into public domains that could involve some statements of guilty on the parties to the proceedings, this could have, of course, some many reputation effects.

But these criminal sanctions in practice are not so much applied, because the public has a lot of interest in knowing about the ongoing proceedings. So even taking some risks, the press tends to publish information that's secret under these provisions.

The second approach that is more efficient than the first

one resorts to private law remedies. In particular injunctions and damages for the violation of the person (inaudible) rights of the suspect and of the accused and, of course, the witnesses and victim. We have, I already cited, provisions in Austria, but also in France. They amended the (inaudible) in order to state that presumption of innocence has to be respected by the press and the Judge can issue injunctions and can order rectification right to reply if a person is publically stated as guilty before a final conviction. And this makes a different shift, a different move respect traditional defamation law, because if you think of the right to respect of presumption of innocence, usually in defamation law you have the defense of the truth of the allegations. Presumption of innocence can be violated even though the person is eventually convicted, because the rationale of the right to respect of presumption of innocence is that there should be no trial by media. The real trial should be in The Court.

The third way of coping with problem of a court related speech restraint is self-regulation. And self-regulation is widely adopted in Europe on the part of the press and on the part of the persons involved in the -- the public officials involved in the proceeding. But let me just quote

a provision of the German press corp of self-regulation just to give you some sense of what's going on in Europe. It's called The Presumption of Innocence and it's stated that, "Reports on investigations, criminal court proceedings, and other formal procedures must be free from prejudice. The principle of the presumption of innocence also applies to the press." And this is stated by the same press agencies. And then I go to some interesting guidelines, but I've no time to explain them, just remand to the paper.

The third point that I wanted to make, but at the moment I have no time, in case in the discussion is that the European Court of Human Rights has tried to strike a balance between this strong national commitment to protection of presumption of innocence and the freedom of the press. Because if you take a look at the Convention of the Human Rights, here you see that freedom of the press, first of all, is not absolute, is not framed in absolute terms as the First Amendment in the US, but has some restrictions devoted, for example, to the protection of the reputation or to the protection of the authority and impartiality of the judicial. And there are many important decisions by European Court of Human Rights from Sunday



Times in (Inaudible) v. Austria that have said that sometimes the State can punish the press for violating the right to fair trial and for violating the right to private life. So there are some arising ways a tendency in Europe to overcome the idea that as did the King in old times the press can do no wrong. The press can do wrong, and has to some sense to be controlled in order to accomplish this important task of informing the public and scrutinizing the way in which justice is administered. Thanks.

BIGNAMI: Professor Phillipson.

PHILLIPSON: I'd like to thank Duke Law School and Kathy Bradley in particular for inviting me to this conference as well. It's been fantastic to be here. I've been incredibly well looked after in the wonderful Duke Inn and it's been wonderfully organized and fascinating, so I hope you won't think me ungrateful if I respond by being slightly critical of the American approach in this area. In fact, it's really more of a kind of critical analysis, I suppose, of First Amendment jurisprudence informed by comparative considerations than anything else.

The US Supreme Court once referred to the right to a fair trial as the most fundamental of all freedoms. Much of this conference has examined the failings of the media and

prosecutors in relation to the coverage of suspects and their trials. But the argument of my paper is that the courts must also take some responsibility for failing to uphold this freedom. And this failure, I suggest, results in part from an excessive concern in American rights discourse about the threat to liberty posed by the State with a concomitant blindness towards the threat opposed by powerful private actors; in this case, of course, the media. So I will critique the role of the courts in this area by taking a comparative perspective contrasting the absolutism of First Amendment jurisprudence with the more balanced and nuanced approach taken in many other Western democracies.

Since the Duke Lacrosse case and other numerous other cases in the lower courts also concerned the destruction damaged the reputation and privacy of suspects. I'll also make a brief mention of invasion of privacy and defamation in English law now heavily influenced by the European Convention of Human Rights under the Human Rights Act.

My starting point is that the activities of sections of the media in cases like the Duke Lacrosse case are instances in which far from performing their legitimate and vital role

in the democracy, they betray it. And this betrayal can have devastating consequences for the individual. In the Sam Shepherd case of which we've already heard, (Inaudible) comments, "The press saturated the community with highly inflammatory, inaccurate, and inadmissible information." Shepherd was convicted. The conviction was eventually overturned, but by then he had spent ten years in prison, he had lost his medical license, he had become an alcoholic, and he died within four years of his eventual acquittal.

Such examples to me represent a betrayal by the press of the First Amendment's purpose as lives and liberty are destroyed in the pursuit of stories that sell. More importantly, perhaps, this is accompanied by stubborn refusal in most American legal discourse to reassess the current approach to the First Amendment in the light of such appalling misuses of the license it grants. The refusal which from the outside looks like a kind of blind faith, a dogmatic attachment which seems to forget why we owned these free speech in the first place and thus risks reducing the First Amendment in (Inaudible) phrase to a purposeless obstruction.

In a recent book I've argued in the modern media age under the pressure of the 24/7 news environment and the extraordinary cult of celebrity we should be ready to ask afresh, does unrestrained media freedom now always serve the goals of free speech. My answer is an emphatic no. I would argue that the uses made of our freedom by the media can often directly undermine the values which underlie the right to free speech itself, human dignity, the search for truth, and the basic foundations of a democratic society amongst which must be the rule of law as expressed in the individual's right to a fair trial. So restricting the media can actually, I would argue, uphold the values underlying free speech.

Let me give you one example. One of the most influential contemporary defenses of freedom of speech is Ronald Walkins arguing for moral autonomy. Based upon the foundational principles, the government must treat all citizens with equal concern and respect. It supports the right to freedom of speech in order to prevent unpopular points of view from being suppressed, because state actors or majorities find them distasteful or offensive. However, where speech is restrained in order to protect fairness of a trial, the State is acting not from such an illegitimate

motive, but rather in order to secure equally for all the right of access to a fair trial.

Such restrictions upon free speech do not, therefore, infringe the basic principle on which free speech itself is founded, for if the fair trial of an individual is arbitrarily affected by prejudicial media comment because that individual is accused of a crime that happens to have caught the media or public attention then the State has failed to secure equal access to justice. Therefore, the very same rationale underpinning free speech, the notion of the State's duty to treat its citizens with equal concern and respect, in this case requires the restriction of the media.

Of the English approach forms a strong contrast of that of the US. While valuing free speech strongly as a vital aspect of a healthy democracy and an important individual right, The Courts and Parliaments are clear that such freedom does not extend to the prejudicing of trials. Thus once a suspect has been charged or arrested, though not before, the rules of the contempt of court Act 1991 are then activated. The publication of material which creates "a substantial risk of serious prejudice" to the

forthcoming proceedings is a criminal offense and exceptionally prior restraints to prevent such coverage may also be used.

This is in harmony with the approach of the European Court of Human Rights in Strasbourg. In the leading case of (Inaudible)/Austria mentioned by Giorgio just said the limits of permissible comment in the media may not extend to statements which are likely to prejudice -- whether intentionally or not -- the chances of a person receiving a fair trial. I would submit as a fairly widespread consensus outside the US that this is the proper approach. There is no legitimate right to prejudice another's trial through speech. To do so is not an exercise, but an abuse of human rights.

Now, of course it will be said that I'm missing the point. American courts do not believe that fair trial rights are not important, they simply find other ways to protect them without restricting the media. But do these methods work? My reading of the available research suggests that there are reasons to be skeptical. The belief that current methods of neutralizing prejudicial coverage are satisfactory I think is complacent, and that complacency

seems to be particularly strong amongst the judiciary.

Many of whom appear to be unaware of the empirical research in the area and to place an exaggerated faith in their own authority and persuasiveness as a means of neutralizing through jury directions any prejudice in the jury resulting from media coverage. It's not perhaps surprising that judges think this way as Howard Schneider so strongly emphasized last night in that fascinating and challenging speech. People found it very difficult to accept evidence which contradicts their cherished beliefs. And what belief can be more dear to the Judge than the notion his own writ runs clear through his own court unimpeded by the media or anyone else.

So what is the evidence to suggest that we should be skeptical? The key point that the research has revealed is that it is not so much expressions of opinion in the media that are damaging, but revelations of fact, particularly if inadmissible evidence is disclosed to the public.

A major Australian study found that jurors can put opinions but not revelations of fact out of their minds. Joann Bradward in an article in the New York University Law

Review summarizes the US research as finding that reports of previous convictions and recounted or other inadmissible confessions creates a persistent bias in the minds of perspective jurors. Steve (Inaudible) noted that in one study more than 72 percent of jurors exposed to stories containing inadmissible evidence voted to convict, whereas less than 44 percent of those not exposed did so.

For example, in the case (Inaudible) a local media had revealed a previous murder conviction and indications of a confession to the second murder charge. The trial court impaneled a jury despite the fact that eight out of 14 of them admitted that at some point they had formed an impression of the guilt of the accused. The Supreme Court refused to overturn that conviction.

Hal Haddon says in his litigation article that the press believes it has the First Amendment right to access and publish every scrap of potential evidence inadmissible or not well before trial. Now this cannot only risk prejudicing the trial, it also attacks the rule of law more directly. The Supreme Court itself noted that the exclusion of such evidence in court is rendered meaningless when news evidence make it available to the public. It makes -- as an



English commentator has put it -- a nonsense of the rules of evidence. And as Frederick Sharrows observed no lawyer has the right to evade the rules of evidence and procedure designed to produce a fair trial by holding a press conference in which he leaks to the media the inadmissible evidence which he cannot put in court. It's hard to see why the media should have this right.

So what about neutralizing measures? The most common -- simply admonishing the jury to disregard what they've heard in the media -- is seemingly the least affective. As Judge Learned Hand put it to comply with an instruction to disregard key evidence revealed in the press would require a mental gymnastics, which is beyond not only the jurors' powers, but anybody else's.

In the United States and Davis a Judge remarked when one is told don't think of elephants, the immediate image in one's mind is an elephant. So goes the effectiveness of instructions to disregard. Justice Jackson put it pretty succinctly. The naïve assumption that prejudicial effects can be overcome by instructions to the jury all practicing law is known to be unmitigated fiction.

Other measures carry no guarantee of success and raise their own problems. Sequestration of the jury places huge burdens on jurors in long trials and moreover can do nothing about the effects of pretrial publicity. Delay of the trial is the least satisfactory remedy. Then is the trial less likely to be able to do justice with the fading of relevant events from witnesses' minds. But it also -- as (Inaudible) pointed out -- is contrary to the guarantee of a prompt trial in the Sixth Amendment and in Article 6 of the European Convention.

In the age of the internet, moving trials to different venues in response to prejudicial coverage in a particular area may no longer be effective. When newspapers keep archives of back issues obtainable on the internet, jurors who did not read about initial coverage may decide to access them and read about them when they are called.

Moreover in the instance of the case that's attracted sustained national coverage, it may be difficult or impossible to find jurors who have not seen it. If you can, you may, as been pointed out, be limiting your jury selection to the uninformed and the ill-educated.

In any event research has found that jurors cannot reliably assess their own potential prejudice. As O'Connors put it this was not surprising. Asking a potential juror whether he or she can be impartial is a little like asking a practicing alcoholic if he has his drinking under control. We're asking the person who has the prejudice to discern if the prejudice will affect his decision.

So my conclusion is you can't be sure that these methods will work and you may, therefore, be condemning suspects to unfair trials. And, of course, pretrial publicity is often also defamatory as in the lacrosse case itself. The treatment of this area in English law, again, forms a contrast to the US approach. Under what is known as Reynolds Privilege, there is a defense for communicating information on a story of real public concern or real public interest which goes beyond that concerning political figures. But whereas New York Times and Sullivan grants a privilege which in the absence of malice applies per se to a category of stories those about public figures regardless of journalistic conduct.

In contrast under English law UK journalist can never avoid liability and libel simply by pointing to the importance of

the story and the fact that it concerns a public figure. In every instance it must be shown additionally that the media took reasonable care that they upheld sound journalistic standards in both sourcing and reporting the story.

So as well as considering the public interest in the story, The Court will also look at factors such as the reliability of the sources and the steps taken to verify them and whether the subject of the story was given the chance to comment upon it and their side included in the story.

This approach, which is in harmony with that taken under the European Convention of Human Rights, of course, grants the media less freedom of action than in the US. But, again, it is based upon the notion that what will best serve the public interest and advance the aims of a flourishing democracy is not simply unrestrained media freedom, but responsible journalism. That, as the House of Lords has said, when reputations are only tainted by the media, society as well as the individual is the loser. As Professor Berentas put it, the public has a free speech interest in the publication of fair, well-researched stories, not in those which are poorly put together and which gratuitously destroy the standing of those in public

life.

Of course The court of public opinion often intrudes into privacy also. Whereas in the US it's been said that the private facts taught us all but being demolished by the First Amendment. Privacy law is flourishing in the UK. The test in English law after the Naomi Campbell case is now whether the claimant has a reasonable expectation of privacy in the information disclosed by the press, something which depends upon the nature of the information as well as all of the surrounding circumstances.

And of course with privacy the issue of verifying the story doesn't arise. So the question then becomes one of finding the right balance between media speech rights and the individual privacy interests. And it's now established following Campbell that the rights to private life and to free speech are presumptively equal. The Court must assess the relative way to the two rights in the particular context. On the privacy side, this will involve examining the degree of intrusion represented by the story. On the expression side, it's now what established that the key test is how far publication of the story serves a genuine public interest as opposed to merely interesting the

public, and whether it goes further than necessary in terms of its revelation of intimate detail in serving that interest. It may be legitimate for the press to reveal, for example, that a Cabinet Minister is having an affair, but to include details of exactly what went on in the bedroom may be needlessly intrusive and not, in fact, serve the legitimate interest that the press is claiming.

What will happen when publication have the effect of damaging the individual's reputation or invading his privacy in the context of a forthcoming trial? Well, we've not yet had such a case, but I believe that in such an instance the fair trial interest will here join hands with the interest in privacy and reputation. Because in assessing the media's claim that the article was in the public interest, The Court will have to decide whether, in fact, it was contrary to the public interest in the fair administration of justice. If the article is really prejudicial in addition to being defamatory, this will be likely to prevent the media from successfully defending cases in defamation or privacy. In this way the individual may be indirectly able to vindicate their fair trial rights against the media through private law without having to rely upon the state.

To conclude, looking at the persistent refusal of the US law to protect individuals from the prejudicial effect of media coverage on their trials and their arrests by restraining the media, when I look at this to me what is going on seems to be the very opposite of American respect for the individual and for individual liberty. Rather it looks very much as if the individual and his or her freedom and rights is being sacrificed to the commercial interest of the media and the curiosity of the majority.

Cases in which a media pack fuel sales by consuming an individual's life and reputation and threatening a miscarriage of justice cannot without perversity be characterized as the exercise of a vital human right to free speech, at least not without surrendering the content and meaning of those rights to powerful commercial and corporate forces of a kind which John Stewart Mill with his famous defense of human liberty certainly never envisioned.

As Executive Producer, Jeff Fagar, said of the Duke Lacrosse case there's something that goes against the American way when a pack rules. A shift from protecting the pack to protecting the individual, rebalancing between the

First and the Sixth Amendments, to more surely protect the famous of trials and the individual would not, I suggest, betray liberty or the constitution but vindicate both.

Thank you very much.

BIGNAMI: Thank you very much for that provocative intervention. Turn over to Peter Jacobsen now.

JACOBSEN: Thank you very much. I, too -- as Gavin has done -- want to express my gratitude to the organizers of this conference and I must say that rarely have I seen such a beautiful place to put up speakers, and had I known, I would have not take two seconds to accept the invitation. I would've taken a millisecond.

I'm delighted to be here. I'm here to present the Canadian perspective on these matters. We heard yesterday that trial by media is as American as apple pie, and I guess in Canada we prefer to do the trials more in a court of law. And I don't say that to be superior, but just to point out where this is going.

Trial by jury is what we're talking about, and in Canada there are criminal trials that will be done by judge alone. That is at the option of the accused in most cases. And I'm talking about serious charges. Many of our criminal charges



that are not of much consequence they are done by judge alone, and our courts have held that one cannot prejudice a trial by judge alone by pretrial publicity. Many of the judges I've spoken to aren't so sure themselves. They're human as well, and if there is a large swell of public opinion in one direction they admit that of course that's going to affect them in some way, but they say their capable of putting that out of their mind and just deciding the case on what is heard before them. So I'm dealing with trials where there is a jury.

We say in Canada that trial by a juror who is capable of putting what they have heard prior to being sworn as a juror is as Canadian as Canada winning the international hockey championship. I've heard that when I came here that Canadians are regarded as being boring, to which all I can say all 35 million of us, well maybe, but I want to tell you one interesting fact that I've not heard here: lacrosse is actually Canada's national game. You know, how we all have national flowers, etc. Well, because the native people in Canada started lacrosse, it's actually Canada's national game, so I figured that maybe one of the reasons I'm here.

It's true that we don't have the First Amendment. We do

have protection of freedom of expression in Section 2B of our Charter of Rights, which I'm embarrassed to say only came into effect in 1982. But at least we do have a charter. We're a little ahead of our British forefathers in that respect, but certainly the British tradition and the British system of fairness is what has been adopted in Canada much more than the American approach to law. So we watch your movies, we watch your television, but we use the British law, more or less.

The freedom of expression in Canada is subject to reasonable measures that are accorded in a free and democratic society, so one can come along in Canada to say well, yes, prima facie freedom of expression is abrogated in this case, but the legislation is justified.

And let me give you an example. Naming of the complainant. Now, yesterday I heard Casey Johnson on this panel talking about the withholding of the name of an accuser and the blogs in this case, in the lacrosse case, the bloggers had named the accuser, and I don't think he was particularly suggesting that was a good or bad thing, but he was mentioning that and saying that's how that information got out. Well, in Canada those bloggers could've been

prosecuted under the criminal code.

We took a case to the Supreme Court of Canada in 1988 to try and set aside the section of the criminal code that said "thou shalt under no circumstances name or provide any information that would tend to identify the complainant in a sexual assault case." And this case was a case where a wife had brought a criminal charge against her husband, so obviously that the name of the accused, the husband was out there, but we couldn't even mention the fact that it was the wife, because that would tend to identify her. And the Supreme Court of Canada said, and I'm now going to do what I tell my students and my juniors never to do, I'm going to bore you by reading, but I'm Canadian, so I'm boring. The Supreme Court of Canada said, "When considering all of the evidence [available] it appears that of the most serious crimes sexual assault is one of the most unreported. The main reason stated by those who do not report this offense are fear of treatment by police or prosecutors, fear of trial procedures, and fear of publicity or embarrassment. The section of the criminal code is one of the measures adopted by Parliament to remedy this situation. The rationale being that a victim who fears publicity is assured when deciding whether to report the crime or not

that the judge must prohibit upon request the publication of the complainant's identity or any information that would disclose it. Obviously since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in the decision. Therefore, a discretionary provision under which the Judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear in my view that such a measure would not, however, achieve Parliament's objective, but rather defeats it."

That's an interesting question. And I think it's one that we all might want to reflect on is whether even in an extreme case, even where we've got a situation where the woman has, as in the lacrosse case, it's become clear that it was a false report, do we want to create the uncertainty for all other women who are coming forward that maybe it will be found that her report wasn't justified? And there's lots of times when the law is wrong or when we can't prove

it beyond a reasonable doubt, is she then going to be outed and is that going to make women much less likely to report these? Supreme Court of Canada says yes. I think it's a matter of interest. I don't think Canada and the United States are that different on that question.

Now, with respect to pretrial publicity, we're also very different from the United States. In Canada, like Britain, the closer you get to a jury trial, the more likely you are to be found in contempt for polluting the jury pool. Now, I don't want to make it sound like this happens very often in Canada, because we all know the rules, but one of the rules is that we're not to publish a prior criminal record after the person has been charged. Before the person has been charged, we've got liable concerns, perhaps, but a prior criminal record, as Gavin has said, same in Canada.

So what do you do about the recidivist pedophile? The guy that's got out of prison for doing unspeakable things to a little girl. In Canada we seem to let them out instead of locking them up forever, but that's another... Even when the psychiatrist will say that there's a 100 percent chance of this person doing it again, 100 percent. We've had a guy who was just let out. He had served his time. In any event,

he gets into the schoolyard two days after being let out and he does it again. Are we really not supposed to report the fact that he has a record for doing the same thing? So what we've done, what I advise my clients, is we can hold our heads up high if we go into court if anybody ever calls us on it and say there's a matter of social importance here.

But if it's a case of some kid breaking into a department store and he was convicted three years ago of selling marijuana on the street corner, then we're going to say no, no, no, no. It doesn't have any -- there's no social benefit. We're not advancing social debate in that regard.

Another example of things that we are not to publish are confessions. Quite often people will come in and confess and the reason that they've confessed is their arm was being pushed very up high behind their back and perhaps the confession won't be admissible at trial as a result. We have had a couple of cases in Canada where the media has published confessions that were made at the time, almost at the time of arrest or shortly after, and then courts have said that this is not permissible.

What the Canadian courts are starting to do more and more now is to look at the extent to which the jury pool has really been polluted in the area in which the jury pool is selected. So we've had a couple of cases where Calgary and an Edmonton Newspaper were charged with having prejudiced a fair trial and the Court of Appeal of Alberta actually did an analysis of the extent to which those two newspapers penetrated the jury pool and they found that there were just a few dozen of the papers sold and on that basis the newspapers got off. A dangerous game to play if you're representing as I do very often a national television network, because TV goes everywhere, and it's pretty hard to say that you can't penetrate the jury pool.

We don't have a system of asking questions of any relevance to perspective jurors. We get to know their occupation and their name, and only in extreme cases will The Court allow us to ask more questions. So we're kind of stuck with those people and sort of eyeballing them and saying oh, gee, you know, it's a middle-aged man and he probably doesn't like drug dealers, so no, we don't want him, but we like that kid over there. He's young. That sort of thing. It's very imprecise and not nearly as useful as your system in terms of the defense being able to figure out, and the

prosecution, being able to figure out what kind of juror they're really going to have on the jury.

We say, and I think it's wrong, that jurors cannot put these facts out of their minds and obey the judge's instructions. That's why we need all of this pretrial protection. I think that there have been ample cases in Canada where we've seen that jurors are capable of doing that. We had a case a number of years ago. Those of you who maybe come from the northern states would've heard of the case of Paul Bernardo who did some unspeakable things to some little girls and the question is whether he actually killed them or his then wife, Karla Homolka, had killed them, and The Court was so concerned about the American media's coverage of this, because it was on America's Most Wanted and all of those lovely programs, and they actually made an order saying any American news organization that broadcasts that information into Canada will be held in contempt. Well, if they're not actually there, it's not going to help us, but there are a lot of American organizations that have a base in Canada. With respect to The Detroit Times, or whatever it's called, they -- am I wrong?

BIGNAMI: Yes. It's the Free Press or the news.



JACOBSEN: The Free Press. I'll take The Free Press.

BIGNAMI: Okay.

JACOBSEN: With The Free Press they said that you can only bring in two copies of it into Canada per person. Now, why two? I don't know. So their concerned about this, and this all gets us back into the internet, right? If you're going to - - right now we say the majority of jurors aren't going to be nearly as likely to have read something on the internet, because you have to go and look for it, as they would if it shows up in the globe and mail on their doorstep. But it's becoming more and more of a concern our ability to protect jurors. And so some people in Canada are saying well, maybe we should do away with the jury system. Others are saying, no, no, jurors can do what they did in the Paul Bernardo case. In that case we knew he had made these films of torturing this girls, and we also knew that he was also known as the Scarborough rapist, a whole other set of criminal charges against him. But it was clear that he had done it and everybody assumed he had done it. They managed to impanel a jury in a day and a half and he got -- and the defense counsel, who are very, very rigorous, they will all say he got a fair trial.

Now, this was going on at the same time as your O.J.

Simpson trial was going on. And if there's ever anything that caused us to shy away from the American system and put our arms around our British counterparts, it was that trial. At that time we were really pushing for cameras in The Court, and we were getting some place. At that time we were trying to go and argue that New York Times insolvent might be something that we want to adopt in Canada or something similar. Well, O.J. and the appearance of the lack of justice in that case and the spectacle of it which revolted the Canadian judiciary, and I think many, cut that off. So we run back into the arms of the British tradition. We're now looking, I've just argued in the Court of Appeal, our courts should adopt the Reynold's defense, which is basically a negligence defense. We did everything we could possibly do to get the story right.

Lastly I want to say I was a little horrified yesterday to here the suggestion that when these young boys were under suspicion for what had happened -- or apparently had not happened -- that the University ought to have called them in and interviewed them. Well, in Canada you don't do that, because you don't want to, again, prejudice their right to remain silent. So my advice to anybody who is in the situation of those young boys is to follow the entreaty of

the great American songwriter Warren Zevon send lawyers, guns, and money.

BIGNAMI: Thank you.

DALGLISH: Okay. Well, there's just a little bit too much to work with here. Listening to my fellow panelists, it's almost as if you would think we've got nirvana here for the media. We get to publish whatever we want, we get everything we want, we have no problems with the courts, the media rule the whole criminal justice system. Well, I'm here to tell you that that's just not the case. I have an entire department at the Reporters Committee we do nothing but work on issues of secret courts and prior restraints. And we're kept busy all the time, because there are plenty of instances out there where courts have taken action to make sure that the media either doesn't get access to something or issues what we would consider to be a prior restraint on the press.

And I understand the idea that sometimes you just want to kick everybody out of the courtroom, and sometimes you just want to eliminate the media's ability to broadcast whatever they want. I'm quoted in the media all the time. I get misquoted or what I think as being misquoted all the time. I understand what it's like to want to just wring their necks.

Now, I think I'd like to give you little bit of law here and then a little bit of perspective. I'm not a law professor. I'm used to kind of talking to the lowest common denominators, so please bear with me if I don't sound very erudite here.

But I think you have to keep in mind a couple of things about where we came from here in the United States. We came from a system that we viewed as being repressive. We were rebelling against government authority. Among those things that we were rebelling against were government secrecy, and courts were included in what we considered to be the government.

Historically in this country we have held our criminal trials in a community, often small county based. You would have a criminal trial. Everyone would know the accused. Everyone would know the victim. Heck, some of the people on the jury probably witnessed the crime. And we had this notion that if you allow fair people to be fair-minded they will come to a fair decision.

When I think of the American system of justice, I think of

the movie *To Kill a Mockingbird*. Gregory Peck is down there in the well, in front of the bar. You've got all of the black folks in the balcony, you've got all the white folks in... but it's a packed courtroom and everybody in that community knows what happened. Everybody in that community has a stake in the result. And Gregory Peck is standing there with the jurors, of course they were all male, but they're sitting there talking about what's impacting the community, and what happened in that courtroom was part of the news of that community, and it was very important for the community to see what was going on.

I think the other systems that we've been hearing about this morning make one assumption that I think is universal, and that is that the only fair jury, the only fair and impartial jury you can have is an ignorant jury. And here in the United States we don't make those assumptions.

When we deal with information coming about the courts at the Reporters Committee we boil it down to two basic areas. One is access. What types of information do you have access to? And the other is prior restraints. Once you have that information, what happens when a court or the judge or someone else in the government tells you that you cannot

publish what you know and what you legally obtained? And as one of your panelists at this conference will tell you that if you issue a prior restraint, it's sort of like poking a sleeping bear in the eye. The media, in particular, will come down on you and you might win, but there are very few things that the media will rebel against harder than a prior restraint.

There are a few things just basic law here in the United States, since I know some of you are getting CLE credit, I will give you some law. Keep in mind that when you talk about the rights of the media or the right of access, we are not talking about the right of the media. In this country, it is the right of the public. To quote from a case called Gannett v. DePasquale the United States Supreme Court said in 1979, "Public confidence cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public with the record supporting The Court's decision sealed from public view." And that's kind of the way the American system of justice works in a nutshell.

There are three sources of the media and the public's rights in this country. One is the old common law based

largely on the English system. One is the First Amendment based rights of access. And another can be based on state or federal statute.

Now, as we discovered in a case called Nixon v. Time Warner Communications back in the late '70s, the common law right of access is not all that satisfactory. We discovered that it could be too easily overcome. So there was a case called Richmond Newspapers v. Virginia that was decided by the United States Supreme Court in 1980. And I think basically the period of time between 1980 and 1986 and perhaps the late '70s and 1986 was sort of where most of the law of public access comes from in the United States. There were a series of cases where the result was very pro-openness.

The Supreme Court has made it very clear that in criminal cases -- the Supreme Court has never decided a case involving civil cases, so everything I'm going to say here applies in criminal cases; although lower courts have found that the same rules apply in civil. Under the Richmond Newspapers, the Supreme Court established a two-part test of whether the public has a right to access to a criminal proceeding. The first prong is whether the place and process have been traditionally open to the press and

public, and if the answer is yes, you go to part two. And you ask whether the public access plays a significant positive role in the functioning of a particular process in question.

Now, since the Richmond Newspaper's case, the US Courts have extended this history and logic test. That's what we call it. The history and logic test. To establish a constitutional right of access to criminal proceedings and records. Now, when the First Amendment applies, the Supreme Court has held that a presumption of disclosure requires The Courts, and this is very important, you're going to hear this over and over and over again when you have somebody in the media showing up in your courtroom, has held that a presumption of disclosure requires courts to grant access unless specific on the record findings demonstrate that the closure is "necessitated by a compelling government interest and is narrowly tailored to serve that interest."

Now, since that time after Richmond Newspapers, we had other cases. The Globe Newspaper's case also involving criminal trials in 1982. Press Enterprise I -- which applied to jury selection in 1984 -- Press Enterprise II



applies to criminal preliminary hearings back in 1986. *In* ray Washington Post in the Fourth Circuit applies to access to sentencing hearings.

So we sometimes find that that countervailing interest that you can issue a closure order, countervailing interests almost always these days applies to a defendant's Sixth Amendment right to a fair trial. We are seeing some instances since 9/11 where the right to protect national security is applying more and more frequently.

But I know that we've only got another ten minutes, and I know we want to get some discussion going, so I think I'm going to skip the rest of what I had to say and just get some dialogue going if that's all right.

BIGNAMI: Thank you very much.

SPEAKER 1: (Inaudible) get their credit?

DALGLISH: I don't know.

BIGNAMI: Thanks very much. Yeah. I'd like to open the floor now to questions and comments on this issue of whether the system as it stands now is fine and good, whether there are useful suggestions from abroad, and please feel free to step in and weigh in.

AUDIENCE: A couple of questions. It seems to me maybe that there's a

bit of apples and oranges. I think what I was hearing from the folks from the other countries was talking about pretrial publicity. I realize there are pretrial hearings and what not. And I don't think they were suggesting, that's their laws and they can correct me, limited public information about conduct of the judicial proceedings themselves. I think part of your (comments and I (inaudible) my question is to the first three speakers is it a fair trial or a fair trial to the defendant and are pretrial comments that might prejudice the prosecution, the State's case, against the defendant, are they equally forbidden or is there an unequal prohibition?

I guess the third question or comment: some people would say I guess take this lacrosse case and talk about that the media played a dual role. At some point it was very prejudicial to the defendants, but after the first couple of months I think it can be fairly said that at least segments of the media, including the nontraditional media, played a huge role in making the public aware of some of the deficiencies of the case. I think the 60 Minutes Ed Bradley's presentation really made the public very aware of the potential and ultimate as it turns out innocence of the students, and I think it could be argued that because the

publicity was so widespread that now these students will go through the rest of their lives they'll be attached to this case, but there will not be a sustained stigma that would be attached to them and their careers that might have been the case had there been no publicity and all that was known is "okay, I was charged with rape and it was later dismissed" or "I was later found not guilty with no one knowing the way the people know now the particulars the media (inaudible)." So a lot of questions I've posed. I'm interested in your comments in any of those.

DALGLISH:

Can I say that the one case I mentioned, I think it was Press Enterprise, does apply to pretrial proceedings, so anything that you can watch during a trial we also have a similar right of access to all records involved that are publically filed or that are filed unless they are specifically closed, plus all pretrial proceedings. And I would argue that the fact that -- I agree with you that you could make a very good argument because those pretrial proceedings were public in the Duke case that a lot of people believed that it did lead to the exoneration of those young men, and I could point, if I had time, to a number of cases in recent years where I think information about those pretrial proceedings being released helped exonerate some defendants.

BIGNAMI: Mr. Resta, do you have any thoughts?

RESTA: I just take a suggestion from your question about the effect of prejudicial publicity on the investigation and on the protection of the defendant. I think that is a topical point that we should discuss and we should probably deepen is the exchange of the information between the media and the police and the prosecutors. So the point is not only how the press will report on a criminal proceeding, but which are the sources of the information of the press. And I think it is a topical point.

I would like to recall a recommendation that we had in Europe, the Counsel of Europe, in 2003 about the provision of information through the media in relation to criminal proceedings. In here are regulated all the way in which judicial authorities, police, prosecutors should communicate information to the media, and this, of course, influenced the way in which the media reports about the proceedings. In here it is stated that first of all the opinions and information relating to ongoing criminal proceedings should only be communicated or disseminated for the media where this does not prejudice the presumption of innocence of the suspect or accused. And then it is also said that the judicial authorities should inform the media

about various essential acts so long as this does not prejudice the secrecy of the investigations and police inquiries or delay or impede the outcome the of the proceedings. So we see here that our concern is with the two points: so the secrecy of the investigation and the presumption of innocence.

I think that we are facing, at least in Europe, a process of what the German call (Inaudible), so (inaudible) of the exchange of information through the media. For example, in Italy in the last year it was said it was limited the possibility for the judges of releasing interviews and commenting upon proceedings, and this, of course, makes some promise from First Amendment, from freedom of speech perspective, but the concern is that we should give information to the press. The press has the right to inform the public. But the better the press informed this the more accurate are the information the better is for the investigation and for the defendants.

PHILLIPSON: Just to answer your points in turn, yes. Open justice is a very elevated value in British law, and, of course, the public are informed everyday in terms of what went on in the trial, what the evidence was led. So in other words, there won't just be the verdict announced without the

record. The record will show why the verdict reached the jury it did and the public will hear all the evidence that the jury hears. So in that sense open justice occurs.

Secondly to answer your other question, yes. Evidence -- you can commit criminal contempt by being prejudicial either way, so if you release evidence that would tend to exculpate the defendant then equally you can be guilty of contempt in that way.

Your third point about vindication of reputation. Well, all I would say was under the UK while the statements made in the press would not have been able to be made while the charges were outstanding, but the moment that the charges were dropped and the legal proceedings came to an end then obviously the media and the boys themselves could make press statements, and the media at that point could then proceed to discuss the case and the boys' reputation would be exonerated, so there would be no long term difference. In fact, in the case it's merely a question of delaying comment until the trial is concluded. So in that sense I would argue another reason for prioritizing Sixth Amendment rights over First or Article 6 over Article 10 is that in one case the media's rights are merely delayed, where as if

you damage the trial's fairness then you've damage it irreparably.

BIGNAMI: Peter?

JACOBSEN: I want to make one comment before I get to these and that's something that Lucy said that we are arguing that the only fair and impartial jury is an ignorant jury. That certainly is not the position in Canada. I don't think it's the position of the UK either. What we want is a situation where the jurors are capable of putting out of their mind anything they've heard and only deciding the case on what they've heard in court. And what the Canadian courts have said, and it sounds like what the British courts say as well, is that where you're dealing with confessions that's awfully hard to do, so let's not make it really hard for the jurors. And where you're dealing with prior convictions, it might also be really hard to do in a lot of situations. So I think that's where they're coming from.

But we've long, long ago recognized that the jurors are going to know an awful lot about a case, particularly if it's a celebrated case. It's going to be all over the media, and the minute someone is arrested they're name is out there. Thank God we've caught -- the police will say, Thank God we've caught the rapist that's in the East End of

Toronto. Well, he hasn't been found guilty yet, and so we're very careful to say according -- that's what the police say. But the jury pool has all heard it.

Yes, in answer to the question you can certainly be found in contempt in Canada if you've jeopardized the Crown's case. In fact, we have many situations where the defense sits back and they kind of like the fact the media might be going a little bit crazy, because they are going to maybe be able to do the one thing that will get their client off and that's argue that they can't get a fair trial. That's never happened, but they keep hoping it will. And it's happened in the UK.

But what is interesting is the Crown in that case will come forward and bring its own motion to prevent us from saying things that they think will prejudice the fair trial in favor of the defense.

So the last thing this business of the widespread the boys in Canada would've gotten their chance to say that they it would've been very clear that they were innocent and I agree with the widespread press, but I've got to tell you I've got a 20 year old daughter and I was telling her about



this case, and she said: "well, dad, yeah, that's great they got off and all that," but she said "hiring a stripper, that's really sketchy." So I think they're still going to have trouble with their reputation amongst a certain group of people.

BIGNAMI: We have time for one more question.

AUDIENCE: This is a question on (inaudible). With the Hatfield case and the Win Ho Li case it seems like the media is getting - - where it's becoming like the British case regardless if the media is going to have to end up paying off civil suits or give up sources because of improperly (inaudible). I'd invite you to say where you think those kinds of cases are going to go.

DALGLISH: Well, that -- she asked a question about the Hatfield and the Win Ho Li cases. Those are not criminal cases. Those are civil cases where two government employees who were being investigated by I believe it was the FBI, in one case the Energy Department, for possibly engaging in illegal behavior, while they were under investigation somebody leaked the fact that they were under investigation to the media -- they were both -- in particularly the Hatfield case. Hatfield was a fellow who was being investigated as the Attorney General said was a person of interest in the anthrax investigation, you know, when they were mailing

anthrax to various locations around the US. Enormous public interest in that case. The Win Ho Li case had to do with the scientist from New Mexico who was being investigated for possibly giving some sensitive information to the Chinese.

Reporters got the information. Those two government employees brought civil actions under the US Privacy Act, which makes it illegal for the US government to release personal information from their government held files. If that happens, you have a right to sue for recovery of damages if you are damaged because of that leak. So they brought those lawsuits against the United States government.

The judges in those cases said that they could only recover if they could prove not which department it came from or the fact that it came from the government, but which individual within each department. The reporters were trying to protect the identity of the sources in the case of the Win Ho Li case. They were told to offer up their sources, they said no, so they ended up participating in the financial settlement with Mr. Li. The Hatfield case is still pending. I don't know what's going to happen for sure

in the Hatfield case.

Among the credo of seek the truth and report if fully, reporters in the United States have a very other strong belief, ethical belief, that they need to protect their confidential sources, so there's also an issue of whether or not these people, the fact that it was reported -- I assume you're getting at the pretrial publicity thing whether or not these guys' lives were ruined because they were in the media.

AUDIENCE: Yeah. I mean, I just think this is an example where somebody is trying to get civil damages because particularly in Win Ho Li most of the charges were dropped (inaudible).

DALGLISH: He pled guilty to a felony, but most of the rest of the, yeah, the rest of the charges were dropped.

AUDIENCE: (Inaudible) all of the charges turned out to be dropped for whatever reason, and so he's coming after the government and in that case it ended up the press paid --

DALGLISH: Part of the damages.

AUDIENCE: (Inaudible).

DALGLISH: In exchange for being able to keep their sources private, yes. It was both very difficult cases. The Hatfield case, like I said, we don't really know how that one is going to

play out yet, but they have been ordered so far to reveal their sources. I think is Judge Walton scheduled to be on the panel later today? Well, you can ask him.

BIGNAMI: Well, please join me in thanking our panelists for a thought provoking presentation.